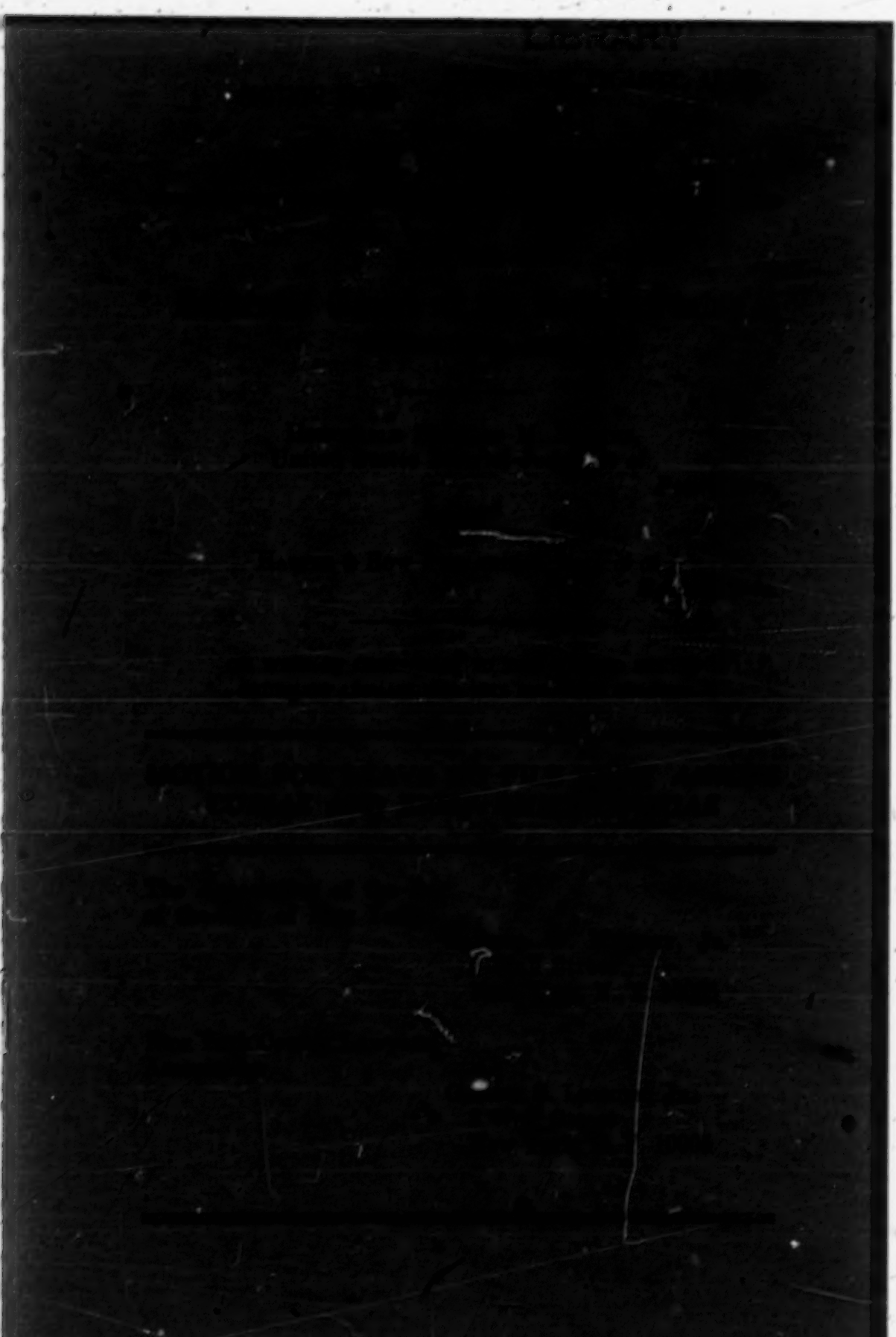

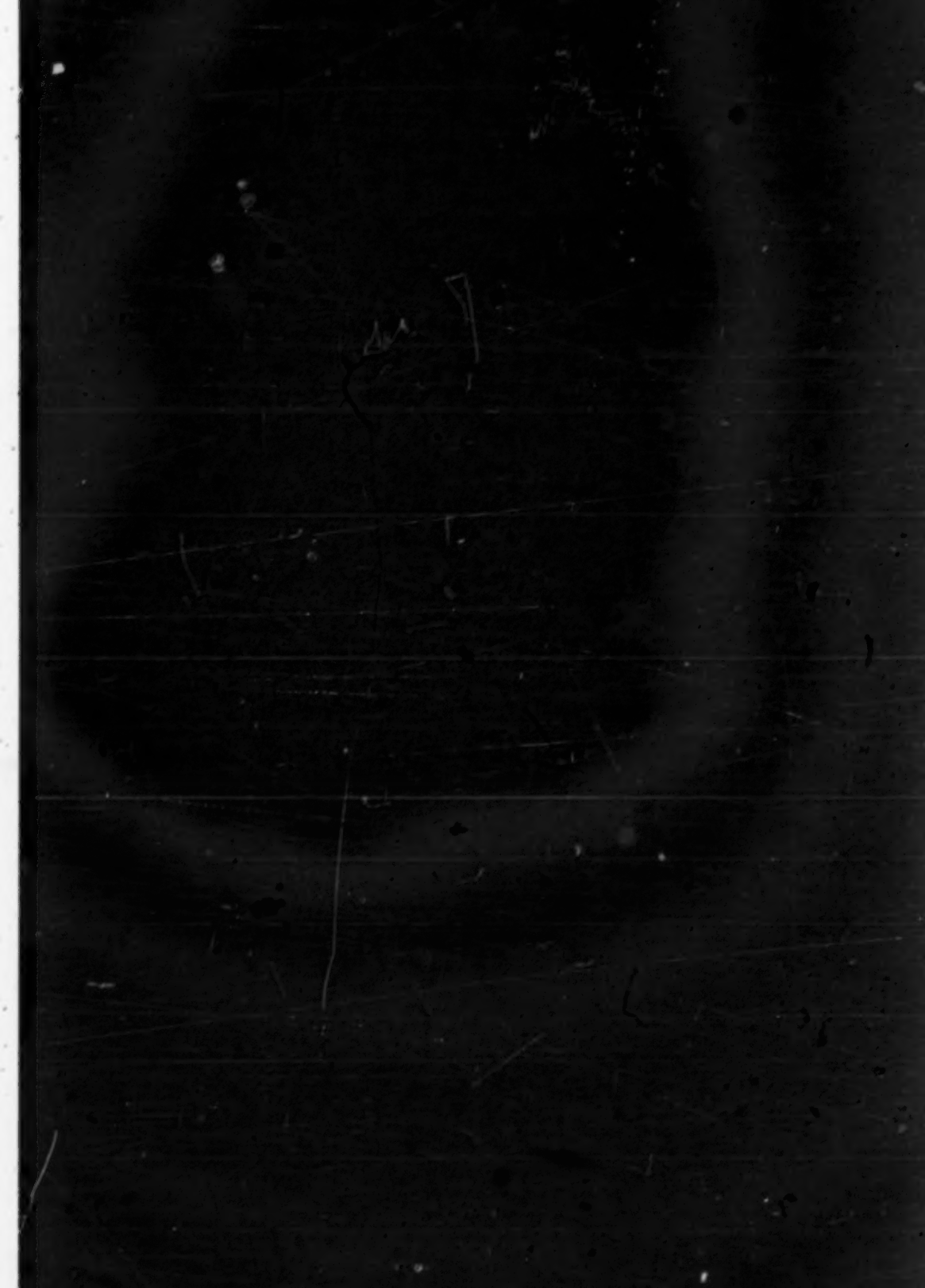

In The

Supreme Court of the United States

October Term, 1969

No. 1337

Honorable Bernard M. Decker,
United States District Judge, *et al.*,
Petitioners,

against

Harper & Row Publishers, Inc., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Association of the Bar of the City of New York and the New York County Lawyers' Association hereby respectfully move for leave to file the attached brief *amicus curiae*. Counsel for respondents have consented to the filing of this brief, but counsel for petitioners have declined to consent.

The Interest of the *Amicus Curiae*

This case presents an important question of the scope of protection against compelled disclosure to be afforded by the attorney-client privilege to communications between independent counsel and their corporate clients.

That question goes to the very roots of the relationship between every member of the Bar and his corporate clients. If private lawyers are to continue their role as trusted and confidential corporate counsellors whose advice and guidance is to a considerable extent necessary to the effective implementation of this country's extensive and complicated system of regulation by law, it is of overriding public importance that the Court lay down a clear and predictable definition of the attorney-corporate client privilege which will allow ample scope to the privilege as it relates to the practical aspects of a modern corporation's need to act through employees at all levels of its business.

The Association of the Bar of the City of New York and the New York County Lawyers' Asssociation submit that the so-called "control group" test which is urged by petitioners is so restrictive as to virtually eliminate the attorney-corporate client privilege and so uncertain in nature as to make prospective determination of its application all but impossible.

The Associations believe that the test applied in this case by the Court of Appeals for the Seventh Circuit is certain and predictable, and affords the protection necessary to the Bar's effective performance of its function and responsibility in advising corporate clients. Accordingly,

both Associations request permission to file the attached joint brief *amicus curiae* in partial support of respondents herein.

Respectfully submitted,

The Association of the Bar
of the City of New York

SAMUEL W. MURPHY, JR.
2 Wall Street
New York, N. Y. 10005

New York County Lawyers'
Association

GEORGE S. LEISURE, JR.
2 Wall Street
New York, N. Y. 10005

Dated: New York, N. Y.
July 24, 1970.

To: All Counsel for Petitioners and Respondents.

No. 1337

IN THE

Supreme Court of the United States

October Term, 1969

HONORABLE BERNARD M. DECKER,
United States District Judge, *et al.*,
Petitioners,

against

HARPER & ROW PUBLISHERS, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE*

The Association of the Bar
of the City of New York

SAMUEL W. MURPHY, JR.
2 Wall Street
New York, N. Y. 10005

New York County Lawyers'
Association

GEORGE S. LEISURE, JR.
2 Wall Street
New York, N. Y. 10005

INDEX

	PAGE
The Interest of the *Amicus Curiae*	1
Statement of the Case	1
Summary of Argument	5
Argument	5
Conclusion	14

AUTHORITIES CITED

Cases:

City of Philadelphia v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962) petition for mandamus denied *sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F. 2d 742 (3rd Cir. 1962), cert. den. 372 U. S. 943 (1963)	3n, 5, 6n, 13
Day v. *Illinois Power Company*, 50 Ill. App. 2d 52, 199 N.E. 2d 802 (5th Dist. 1964)	6n
Garrison v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Calif. 1963)	6n
Hickman v. *Taylor*, 329 U. S. 495 (1947)	8n
Hunt v. *Blackburn*, 128 U. S. 464 (1888)	6
Natta v. *Hogan*, 392 F. 2d 686 (10th Cir. 1968)	6n
Radiant Burners, Inc. v. *American Gas Association*, 320 F. 2d 314 (7th Cir. 1963), cert. den. 375 U. S. 929 (1963)	7
United States v. *United Shoe Machinery Corporation*, 89 F. Supp. 357 (D. Mass. 1950)	7
Zenith Radio Corp. v. *Radio Corp. of America*, 121 F. Supp. 792 (D. Del. 1954)	7

Statutes:

	PAGE
28 United States Code § 1292 (b)	3
28 United States Code § 1407	1

Miscellaneous:

Louisell; *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 Tul. L. Rev. 101 (1956) 10, 11

Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates (March 1969) 12, 13, 14

Recommendation and Study Relating to the Advisory Committee's Preliminary Draft of the Proposed Federal Rules of Evidence: Project of a Committee of New York Trial Lawyers (June 1, 1970) 12

Report of American College of Trial Lawyers Committee to Study the Proposed Rules of Evidence for United States District Courts and Magistrates (February 1970) 12, 13

Report with Respect to the Proposed Rules of Evidence for the United States District Courts and Magistrates, Committee on the Federal Courts of the Association of the Bar of the City of New York (May 28, 1970) 13

Report of the New York County Lawyers' Association on the Proposed Federal Rules of Evidence transmitted to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States under letter dated April 8, 1970 ..... 13, 14

Rifkind, *Access to Client and Adversary—A Plea*, 22 Record of N.Y.C. B.A. 566 (1967) 11, 12

8 Wigmore, *Evidence*, § 2317 (McNaughton's rev. 1961) 7

In The

Supreme Court of the United States

October Term, 1969

No. 1337

Honorable Bernard M. Decker,
United States District Judge, *et al.*,
Petitioners,

against

Harper & Row Publishers, Inc., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE*

The Interest of the *Amicus Curiae*

The interest of the *amicus curiae* is set forth in the motion to which this brief is appended.

Statement of the Case

This petition arises out of consolidated pretrial proceedings being conducted pursuant to 28 U.S.C. §1407 before the Honorable Bernard M. Decker, United States District Judge for the Northern District of Illinois, in multi-district

treble damage antitrust cases involving the sale of library editions of children's books.

On October 17, 1969, Judge Decker entered an Order, on his memorandum opinion of October 7, 1969, permitting plaintiffs below to inspect and copy, *inter alia*, certain "debriefing" memoranda prepared by counsel for corporate respondents reflecting the results of interviews with corporate employees who had appeared before a federal grand jury investigating various aspects of the publishing industry.

Some of the persons interviewed were employees of respondent corporations at the time of the interview and were interviewed only by counsel for that particular corporation. Some of the persons interviewed were no longer employees at the time of the interview; others were employed by one of the respondents at the time of the interview, but were interviewed by counsel for another respondent.

Respondents had resisted production of those memoranda on the grounds that they were protected from disclosure by a privilege running between the interviewing attorney and his corporate client, or the interviewing attorney and the individual witness interviewed; and in any event because they were protected under the qualified privilege deriving from the work product doctrine.

In the course of his decision, Judge Decker held that the attorney-client privilege protects the confidentiality of communications between a corporate client and its attorneys only in so far as those communications are with a corporate agent or employee who is: (1) a responsible member of the corporation's management or control group; (2) seeking legal advice about the corporation's affairs; and (3) who is also in a position to influence the decision

about which legal counsel is sought (Petitioners' App. p. 16a).*

Judge Decker refused to make certification under 28 U.S.C. § 1292(b) and respondents sought a writ of mandamus in the Court of Appeals for the Seventh Circuit.

On appeal, the Seventh Circuit did not disturb Judge Decker's findings that no attorney-client relationship existed between a corporate respondent's attorney and witnesses interviewed who (a) were no longer employees of the corporate client at the time of the interview; or (b) were employees of one of the respondents when interviewed, but were interviewed by counsel for another respondent. Nor did the Circuit Court, by the vehicle of mandamus, disturb Judge Decker's finding that no personal attorney-client relationship existed between the corporate attorneys and the employees interviewed.

The Circuit Court did, however, conclude that Judge Decker had erred in limiting the attorney-client privilege to the "control group" in situations where corporate employees had been interviewed only by the attorneys representing that corporation. The Court first found: "It is sufficiently clear that each employee made his disclosure to the attorney at the direction of his corporate employer and on its behalf; and that the subject matter of his grand jury testimony and of the debriefing interview was

* This follows substantially the so-called "control group" test formulated in Judge Kirkpatrick's decision in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962) upon which Judge Decker relied. It is notable that Judge Decker apparently recognized that grand jury debriefing statements may in and of themselves be privileged communications, since he refused to require the production of the statements of witnesses Bonsal and Milne after finding that they were executives ". . . in a position to influence their company's litigation strategy in these lawsuits." (Petitioners' App. p. 17a).

germane to the duties of his employment." (Petitioners' App. p. 62a). The Court went on to rule:

> "We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.
>
> "It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.
>
> "We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.
>
> "And because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate". (Petitioners' App. p. 63a).

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 4, 1970 and amended by order of March 11, 1970. The petition for a writ of

certiorari was filed on March 20, 1970 and granted on May 4, 1970.

This brief *amicus curiae* is addressed solely to the District Court's application of the "control group" test and is not concerned with any other aspect of that Court's decision or with any other issue here presented by the parties.

Summary of Argument

As a juridical person entitled to the assistance of counsel, a corporation is entitled to the full protection of the attorney-client privilege which preserves the confidentiality of communications between any client and his attorney.

The "control group" test applied by the District Court imposes an undue restriction on that protection and would tend to discourage full and frank disclosure by corporations to their attorneys.

The Bar at large requires a determination of the scope of the attorney-corporate client privilege which is both certain and predictable and broad enough to permit it to perform its proper function in advising and representing corporate clients.

ARGUMENT

At issue is whether the attorney-client privilege between a corporation and its attorneys shall remain viable and predictable or whether it shall be unduly narrowed and left to the nebulous and impracticable "control group" test first enunciated by a District Court in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962).

Under the *Philadelphia* doctrine confidential communications between corporate personnel and corporate counsel

are privileged only if the corporate employee communicating with the attorney is a member of a so-called "control group" which seeks legal advice from counsel, or is in a position to influence the decision about which legal counsel is sought.*

Such a definition of privilege not only works an undesirable erosion of traditional concepts of the attorney-client privilege, but makes the existence of the privilege virtually unpredictable at the time when counsel is first approached and must give his client precise assurances with respect to the status of future communications with him.

No lengthy review of the origins and history of the attorney-client privilege need be recited for this Court, which in 1888 instructed that the attorney-client privilege ". . . is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure". *Hunt* v. *Blackburn*, 128 U. S. 464, 470 (1888).

There is no valid distinction between the need for the privilege between the attorney and an individual client and the attorney and his corporate client. Indeed, the modern day lawyer may be more frequently called upon by his corporate clients than by the individuals whom he represents. Much corporate legal advice is intended to

---

* While the "control group" test has occasionally been applied by other courts since the *Philadelphia* decision, it has generally been quoted without explanation or reasoning and without recognition of contrary authority. See *Natta* v. *Hogan*, 392 F. 2d 686 (10th Cir. 1968); *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Calif. 1963); and *Day* v. *Illinois Power Company*, 50 Ill. App. 2d 52, 199 N.E. 2d 802 (5th Dist. 1964).

be remedial and serves the socially desirable end of keeping corporate activity within the law. The necessity for mutual confidence and full disclosure in the corporate context is surely as urgent as it is in individual relationships:

> "A corporation is entitled to the same treatment as any other 'client'—no more and no less. If it seeks legal advice from an attorney, and in that relationship confidentially communicates information relating to the advice sought, it may protect itself from disclosure, absent its waiver thereof." *Radiant Burners, Inc.* v. *American Gas Association,* 320 F. 2d 314, 324 (7th Cir. 1963), cert. den. 375 U. S. 929 (1963).

Dean Wigmore recognized that if the privilege is to be meaningful in a corporate context, it must attach to any appropriate communication with a corporate agent, whatever his position in the management hierarchy:

> "*Communications from the client's agent.* The client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege." 8 Wigmore, *Evidence,* §2317 (McNaughton's rev. 1961) (Emphasis in original).

See also *United States* v. *United Shoe Machinery Corporation,* 89 F. Supp. 357 (D. Mass. 1950), and *Zenith Radio Corp.* v. *Radio Corp. of America,* 121 F. Supp. 792 (D. Del. 1954), where both Trial Judges recognized the necessity of protecting communications between the corporate

lawyer and a full range of corporate agents and employees.*

No lawyer can, nor should he be required to, render counsel without a thorough investigation of the underlying facts upon which his advice will be grounded. Such an investigation is the more important in anticipation of corporate counselling, because of the complex maze of regulatory legislation within which a corporation must now operate. It is equally evident that events or conduct of which the attorney must be apprised in order to advise a corporation are often peculiarly within the knowledge of lower echelon corporate employees and sometimes entirely beyond the ken of those who may be defined as within the "control group."

By way of example, let us suppose that the top management of a large manufacturing corporation requests independent counsel to conduct an in depth investigation of the marketing practices of one of its divisions with a view to obtaining recommendations and advice so as to insure compliance with the antitrust laws. Upon accepting the assignment, counsel is referred to the division executives who have been instructed to cooperate fully in the investigation and to require the same cooperation of every employee in the division. Counsel has no further interim dealings with the top management which retained him, but

---

*The test applied by the Seventh Circuit for determining the scope of the attorney-corporate client privilege in no way conflicts with this Court's decision in *Hickman* v. *Taylor*, 329 U. S. 495 (1947). The employees interviewed by corporate counsel in *Hickman* were treated only as witnesses by this Court and not as agents of their corporate employer making confidential communications to counsel on behalf of their employer. "For present purposes, it suffices to note that the protective cloak of this [attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation". (*Id.* at p. 508).

commences his investigation at the lowest sales level and works his way up through the divisional hierarchy. Personal interviews are conducted by counsel and other lawyers in his office and separate memoranda are prepared reflecting and analyzing the results of each such interview. Based upon these memoranda, counsel then prepares a narrative factual statement describing the division's marketing activities, some of which counsel believes might be construed as violative of the antitrust laws, or at least unnecessarily close to the borderline of the law. Finally, counsel makes written recommendations suggesting specific changes in procedures which he believes will assist in avoiding legal pitfalls, and submits those proposals to the top management which retained him.

What are the consequences of this desirable effort if privilege is to be determined *ex post facto* by the "control group" test?

Is the "control group" limited to the top management which retained counsel, but in this instance gave him no factual information; or does it include some or all of the executives and other sales employees at the division level? Must these questions await later discretionary determination by a Court?

One thing is certain. Under the "control group" test, counsel may later be compelled to be a dangerous witness against his own client. His memoranda of interviews with lower echelon employees must be produced at the behest of a demanding plaintiff. Presumably counsel might be sworn and deposed, or called to the witness stand at trial, and be compelled to disgorge the information upon which he based his remedial recommendations.

With this predictable result (or even uncertain possibility), it takes little imagination to envision the limited

role which counsel will be willing to undertake in future counselling of such a nature.

Petitioners here contend that depriving them of the opportunity to peruse these few attorney's memoranda would result in ". . . allowing the truth to be suppressed . . ." (Brief of Petitioners, p. 37). All rules of privilege suppress information. But such rules are designed to foster truth in a forum other than the courtroom, even at the risk of non-disclosure during litigation. They represent a conscious decision by legislature or court of law to further extraneous social policies, such as preservation of the marital relation, and physician-patient and attorney-client relationships.

The attorney-client privilege should not be demeaned by characterizing it as a rule of exclusion as it applies to the circumstances of any particular lawsuit. Privileges reach far beyond the halls of the courthouse:

> "The privileges are guarantees for the benefit of their holders; they exist from the moment of their inception in the confidential communication; they normally survive all the vicissitudes of life save only waiver by the owner; they survive even his death. The law will protect them at all stages of their existence. If they are in the form of written documents, the law will protect them against theft, trespass, subpoena, or other infringement; if oral, from all types of seizure to which such are susceptible: coercion, physical or psychological, trickery or fraud. If the holder becomes involved in litigation, a new type of attack on his privilege may or may not be made in the discretion of his adversary. But if the attack is made, if the infringing question is propounded, the law through the judge will continue its protection by now affirmatively enveloping the holder in a cloak of silence. Realization that all this protection is for the holder of the privilege as such,

regardless of whether or not in litigation he becomes an adversary or neutral witness, perhaps most keenly focuses up that the exclusionary feature of the privileges, far from defining them, is only an incident of their vitality." Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 Tul. L. Rev. 101, 113-14 (1956).

Judge Rifkind has deplored the tendency toward erosion of the attorney-client privilege in an address given before the Fellows of the American College of Trial Lawyers in 1967:

> "What has gone unobserved is that *society's* need for such easy access between the client and the lawyer has grown ever more rapidly and more extensively. By this I mean that a very large area of regulation by law would today be impossible of enforcement were it not for the services of a highly sophisticated, well-informed and highly-principled Bar.
>
> * * * * * *
>
> "But in order to discharge this important function, the lawyer must enjoy the unlimited confidence of his client and unrestrained freedom to inquire of his client. These he will not achieve, nor, if he does achieve them, will he exercise them, unless he rests secure in the so-called lawyer's privilege, in the certainty that what he learns is not for the benefit of anyone except his client; that no agency of government, in a public or private cause, can compel disclosure.
>
> * * * * * *
>
> "The minute you start qualifying, the minute you start questioning, the minute you put limitations, at that point you nullify the tool which is indispensable to the carrying out of the lawyer's responsibility; and at that moment you are in trouble as far

as the honorable practice of your profession is concerned." (22 Record of N.Y.C.B.A. 566, 567, 568, 573 (1967)).

Petitioners set much store by the fact that the Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates (March 1969) embodies the "control group" test by defining "representative of the client" as "One having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client." (Rule 5-03(a)(3)).

So it does. But the future of the Preliminary Draft of Proposed Rules of Evidence, as it seeks to encompass privileges, would seem a highly uncertain one. A Report prepared by a Committee of New York Trial Lawyers and submitted to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States declared: "The project conclusion is that privileges have no place in the proposed rules." (p. 29).* Even upon the assumption that the proposed rules relating to privileges would be promulgated, the Committee of New York Trial Lawyers specifically opposed codification of the corporate "control group" test and suggested language changes in the proposed rule. ". . . in order to encourage complete disclosure in communications between lower echelon employees and attorneys representing the employer." (*Id.* at p. 44).

The American College of Trial Lawyers recommended the following italicized language for the definition of "representative of the client" in lieu of the proposed language in brackets:

---

*Recommendation and Study Relating to the Advisory Committee's Preliminary Draft of the Proposed Federal Rules of Evidence: Project of a Committee of New York Trial Lawyers. (June 1, 1970).

Proposed Rule 5-03(a)(3):

> "A 'representative of the client' is [one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client] *an agent or employee of the client who in the interest of the client obtains professional legal services or who on behalf of the client acts on professional legal advice or who at the instance of the client gives information to the client's lawyer.*" (Report of American College of Trial Lawyers Committee to Study the Proposed Rules of Evidence for United States District Courts and Magistrates, p. V(5), (February 1970)).

The Committee on the Federal Courts of the Bar Association of the City of New York had this to say with respect to the definition of "representative of the client" in the Proposed Rules:

> "This definition seriously limits the attorney-client privilege in the case of a corporation. While it does in fact follow the decision of Judge Kirkpatrick, *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), it is something of an overstatement to say, as does the Advisory Committee, that 'the rule reflects the trend of recent decisions'.
>
> . . . . . .
>
> "We disapprove the rule as drafted and recommend that 'representative of a client' be defined in such a way as to protect communications with lower echelon employees when such communication is in furtherance of the rendition of professional legal services." (Report with respect to the Proposed Rules of Evidence for the United States District Courts and Magistrates, Committee on the Federal Courts of the Association of the Bar of the City of New York, pp. 43-4, (May 28, 1970)).

The New York County Lawyers' Association also voiced its opposition to codifying the "control group" test in Rule

5-03(a)(3) of the Proposed Rules of Evidence. In its Report, submitted to the Committee on Rules of Practice and Procedure, it concluded:

> "If communications by lower echelon employees are not privileged the investigating lawyer could presumably be called upon at any time to produce records and to testify as to the substance of all such communications. It is suggested that rules of evidence should not result in discouraging communications to lawyers made in a good faith effort to promote compliance with the complex laws governing corporate activity." (Report of the New York County Lawyers' Association on the Proposed Federal Rules of Evidence, Article V, p. 8, transmitted to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States under letter dated April 8, 1970).

Conclusion

The Bar at large needs assurance that corporate clients will be afforded the full protection offered by the attorney-client privilege and that the existence of that privilege will be both predictable and certain. The standard applied by the Court of Appeals for the Seventh Circuit provides that assurance, and the judgment should be affirmed.

Respectfully submitted,

The Association of the Bar
of the City of New York

Samuel W. Murphy, Jr.
2 Wall Street
New York, N. Y. 10005

New York County Lawyers'
Association

George S. Leisure, Jr.
2 Wall Street
New York, N. Y. 10005